

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLANTS

United States Court of Appeals *States Court of Appeals*
For the
FOR THE DISTRICT OF COLUMBIA CIRCUIT *District of Columbia Circuit*

FILED JAN 9 1957

No. 13, 603

Joseph W. Stewart
CLERK

ELTON F. KING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 13, 604

JOHN H. THOMAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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(i)

STATEMENT OF
QUESTIONS PRESENTED

1. Was the motion to suppress the evidence and to quash the search warrant improperly denied?

2. Did the Court commit prejudicial and reversible error when it refused to give defendants' requested instruction relating to the quantum of proof necessary to establish a prima facie case and that measure of proof necessary to establish the guilt of the defendants beyond a reasonable doubt?

3. Was there any instruction given, with sufficient explicitness, to the effect that the defendants could be found innocent if the government failed to prove each and every element of the crimes charged?

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JURISDICTIONAL STATEMENT

These appeals are from the judgment and sentence imposed upon the appellants, Elton F. King and John H. Thomas, after a trial by jury before the Honorable Joseph C. McGarraghy, Judge, United States District Court for the District of Columbia, and a sentence imposed as follows: Elton F. King, sentenced to imprisonment for a period of

eight (8) months to twenty-four (24) months on Count One; One year on Count Two, said sentence to run concurrently with the sentence imposed in Count One; and to pay a fine of one thousand (\$1, 000) dollars on Count Twelve. John H. Thomas, sentenced to imprisonment for a period of Five (5) months to Fifteen (15) months on Count One; One year on Count Four, said sentence to run concurrently with the sentence imposed in Count One; and to pay a fine of one thousand (\$1, 000) dollars on Count Fourteen.

Jurisdiction is vested in this Court by Title 28, U.S. Code, Section 1291, and Rule 37, Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

The facts are substantially as follows: A member of the Metropolitan Police Department made application for and received a search warrant for the premises described as King Brothers Service Center located at 4451 Deane, Avenue, N.E., Washington, D.C., this officer asserting in the affidavit in support of the application for the search warrant that, on January 16, 1956, he, having received "reliable" information that a numbers lottery was being conducted on the aforementioned premises, made certain observations of these premises; that he made no other observations except on this date; that on this date he saw certain conduct on the part of the appellant King which convinced him that a lottery was being conducted on these premises; that he accordingly went to the United States Commissioner and made affidavit as to what he saw going on in the premises and secured a search warrant for these premises. This officer stated in his application for the search warrant that he had on January 16, 1956, entered upon the premises and went to the men's room and that while en route there he saw the appellant King sitting at a desk; that to the left of King there were what he characterized as "regulation" numbers slips, and to his right he had a pencil in his right hand, and to the right there was a bag and this bag contained some change and bills. This officer stated further in his affidavit in support

of his application for the search warrant that in the center of the table there was a three by five pad which had three numbers on it; further, that when he, the officer came out of the rest room and approached the desk where the appellant King was sitting, the appellant, King, grabbed the so-called numbers slips and placed them in his coat pocket and attempted to cover up the pad referred to above. Having secured the search warrant the officer in company with other officers went to the premises on February 3, 1956 and there arrested the appellants King and Thomas, along with others, and seized certain paraphernalia allegedly used or to be used in the operation of a so-called lottery.

This officer testified, and it is undisputed, that it was the sole and single observation made on January 16, 1956, upon which he, the officer, made the affidavit in support of the application for the search warrant; further, that the alleged "reliable" source of his original information was not disclosed or identified.

Appropriate motions were duly made to suppress the evidence, to quash the search warrant, for judgment of acquittal at the close of the government's case and again at the close of the entire case; motion for new trial and/or judgment of acquittal was made after the verdict of the jury and prior to imposition of sentence; all of these motions were denied. None of the defendants took the witness stand.

STATEMENT OF POINTS

1. The search warrant issued in this case did not show on its face probable cause for the issuance of the same; accordingly, the motion to quash the warrant and to suppress all evidence obtained under it should have been granted.

2. Defendants' requested instruction number Two should have been granted and the refusal of the Trial Judge to grant same had the effect of sending the case to the jury without defining to the jury the important difference between what constitutes "prima facie" proof, and what proof is necessary to establish guilt beyond a reasonable doubt.

3. There was no explicit instruction that defendants could be found innocent.

SUMMARY OF ARGUMENT

1. Where persons suspected of carrying on an illegal operation of the lottery game are admittedly also engaged in the operation of a perfectly legal business at premises licensed as a gas station, it would appear that something more than one lone observation by a police officer, unaccompanied by any other officer or person in authority, should be required before issuing a search warrant for the premises in question.

2. The statutes under which these appellants were charged with lottery violations used the words "prima facie"; this term is not a common everyday expression readily understandable by laymen; therefore, the jury should have had the benefit of an instruction from the Court as to the legal denotation and connotation of such legalistic terms.

3. Except for the following quotation, "If after weighing and considering all the evidence in this case you cannot say that you are satisfied of the guilt of the defendants, then you have a reasonable doubt and should find them not guilty.", (TR 150), there was no instruction, in terms, with sufficient explicitness, to the effect that the defendants or any one or more of them could be found innocent or not guilty.

ARGUMENT

Notwithstanding the number of defendants originally named in the indictment, and notwithstanding the number of Counts in that indictment, it appears that this appeal really involves two questions affecting, we say, the substantial rights of appellants here. The number of defendants and the number of counts in this indictment might suggest, inferentially, at least, that this case is an involved and complicated matter but, on analysis, for our purposes, it appears to be a rather simple case raising, as is usual in cases where search warrants are executed, etc.,

issues going to the validity of such warrants and the matter of probable cause for the issuance of such search warrants. The other matter concerns the refusal to give what we consider to be an important instruction covering the law, insofar as it relates and defines the very different tests to be applied in establishing, first, a prima facie case, and secondly, establishing and proving the case to the satisfaction of the jury far beyond the prima facie showing, and indeed to the point of "beyond a reasonable doubt".

I.

The Motion To Suppress The Evidence and to Quash the Search Warrant Was Improperly Denied, Both Preliminarily, Prior to Trial, and Again, When the Same Motion Was Renewed at the Trial on the Merits.

It is conceded that nowhere do we find any hard and fast rule postulated by the Courts spelling out with precision what constitutes probable cause for the issuance of a search warrant.

The substantial questions of law involved in this appeal are as follows: that in the absence of more than this one isolated observation of the premises and the appellant, King, it can hardly be said that there was sufficient probable cause for the formulation of a belief on the part of the officer that a lottery was being conducted on the premises: further, that there is nothing in the record of either the preliminary proceedings, or the trial, to show that the alleged "reliable" source of information was indeed "reliable", or that the officer had checked into the reliability of this source of information, or that the officer had ever on any other occasion acted upon the information from this source and found the information to be, in fact, "reliable". That this search warrant never should have been issued on the sole observation of the officer because even assuming that the officer saw what he claimed to have seen, certainly did not furnish any basis for the United

States Commissioner to conclude that probable cause existed for the issuance of a search warrant of the premises where the appellant, King, was concededly operating a business which was lawful and properly licensed in all respects; that the issuance of the search warrant in this case was not justified by the evidence before the Commissioner when he issued said warrant, and that the issuance of the warrant was in violation of the appellant's constitutional rights under the Fourth Amendment to the Constitution of the United States; also, the issuance of this warrant does violence to the appropriate rule of the Federal Rules of Criminal Procedure applicable here, that is, Rule 41(c), F.R.C.P., as amended.

While the government in the preliminary proceedings and the actual trial below made no issue of it, we state at the outset that these appellants and both of them are "persons aggrieved" and as such have standing to complain relative to the issuance and execution of this search warrant which they say violated their rights. (Rule 41(c) of the Federal Rules of Criminal Procedure).

Turning then to the gravamen of this appeal, we state at the outset that we recognize that in all appeals, just like in petitions for the writ of certiorari to the Supreme Court, we are confined to the question as to whether there is a substantial question of law involved and of such import that it can fairly be said that even one judge on the appellate level may entertain some misgivings concerning the correctness of certain rulings made either in the proceedings preliminary to trial or in the trial itself.

In support of our contention that there did not exist probable cause for the issuance of this search warrant, we contend that the search warrant issued herein is not supported by an affidavit evidencing on its face probable cause for the issuance of the same; that the evidence seized under the search warrant was in fact, and in law, seized in derogation of the rights of these appellants under the Fourth Amendment to the Constitution of the United States.

The affidavit is insufficient on its face to show probable cause for the issuance of a search warrant. The affidavit is as follows:

*****"Having received information from reliable source that a numbers operation was taking place on the premises 4451 Deane Avenue, N.E., Pvt. Felix R. Aiken was assigned to investigate. Monday, January 16, 1956 at about 12:10 P.M. Pvt. Felix R. Aiken went to the premises of 4451 Deane Avenue, N.E. While on the premises Pvt. F. R. Aiken observed King, Elton Franklin, a known number operator sitting at a desk with a large stack of numbers slips in front of him and a bag containing several dollars in change. When King saw Pvt. Aiken he immediately placed the stack of numbers slips into his right inside coat pocket and attempted to cover a pad that was lying on the desk. This pad had three numbers plays written on it with sums of money opposite the figure.

It is the belief of the undersigned officer that premises 4451 Deane Avenue N.E. located in the District of Columbia, is now being used to conduct a policy lottery and that numbers slips and/or other numbers paraphernalia are now being secreted in this premises, in violation of the lottery laws of the District of Columbia and the aforementioned person is actively engaged in the operation of a policy lottery. I believe that the individual named herein is the owner or operator of the above premises.

/s/ Felix R. Aiken
/t/ Felix R. Aiken
Moral Division, MPDC

Jurat".

In substance the affidavit states that having received "reliable" information the officer went to the premises described in the warrant on January 16, 1956, made certain observations; then without indicating that any other observations were made, swore to the aforementioned affidavit and secured a search warrant on January 25, 1956, and executed said warrant on February 3, 1956. It is noted that approximately eighteen

days elapsed between the date of the alleged observations and the execution of the warrant. Also, it is to be noted that, again, without further observations alleged in the affidavit, application for the warrant was not made until eight days after the original observations.

It is to be anticipated that the government counsel may choose, among other cases, to rely on Wyche v. United States, 90 U.S.App.D.C. 67, 193 F.2d. 703(1951), but in that case, although the facts appear to be somewhat analogous, there were three days of observations, and it is also significant that more than one police officer, and indeed their informant executed affidavits in securing warrants.

Here in the instant case, we have a lone police officer going into a public place where legitimate business was being conducted, (a gasoline station) and later swearing that an illegal business was being also conducted there. It is just as consistent with a legitimate purpose as it is with an illegitimate purpose that the officer allegedly saw the appellant King handling money and slips or pieces of paper. It is also noted that in Wyche v. United States, supra, the Court in its opinion, stated, among other things, "By personal observation, the officers who conducted the search and made the arrests carefully checked the information they had received from the informant." In this case we have no such allegation in the affidavit nor do we find any other indication that the alleged information received from the informant was "reliable" other than the officer said it was so.

Furthermore, this gasoline station was and is a public place not under the exclusive control of the appellant, King, at all times. There is no evidence to show that the people who were arrested as they came in the premises on February 3, 1956 were coming there in order to transact "numbers" business with the appellant, King, or with any other person or persons, because even the officer, Aiken, stated in his affidavit that the appellant, King, was allegedly observed there alone, by himself, on the sole occasion, January 16, 1956, and there

is no suggestion that anyone else was there on January 16, 1956.

Another point which we think is important is the fact that the officer stated in his affidavit that he had observed the appellant, King, a known numbers operator; however, there is nothing in the record of this case, either preliminarily or at the trial, to show by what evidence he had discovered that the appellant, King, was a "known numbers operator".

This characterization of the appellant, King "as a known numbers operator", is entirely unsupported by anything appearing in the record of this case. There is no showing that the officer checked to see whether appellant, King, had ever been arrested or convicted for violations of the lottery laws or even that he was able to say that from past experience and/or so-called "reliable" information, he discovered that the appellant, King "was engaged then and there in the operation of a lottery commonly known as the 'numbers' game."

Finally, it is respectfully submitted that in securing a warrant to search premises such as we have here, where to all intents and purposes a legitimate business was being conducted, something more than one isolated observation of one lone alleged numbers operator is necessary before a prudent man could reasonably conclude that a "numbers" operation was being conducted on the premises. It is to be borne in mind that in the operation of a gasoline-station business that it is readily conceivable that persons operating such a business would be engaged every day in handling sales slips, adding machines, daily run-down tapes showing business transacted for any particular period, bags of change and bills, et cetera. There is nothing sinister about an owner or employee being seen daily with sales slips and other paraphernalia which might conceivably be mistaken for and confused and identified as items also used in the operation of the "numbers" game.

In any event, it is submitted that search and seizure is governed by the adjudicated cases, and an examination of all of the cases decided in this jurisdiction, where the question of probable cause for the issuance of a search warrant relating to "numbers" operations fails to disclose so far as we are able to determine, a single case where the lone observation of a police officer under the circumstances such as attend this case, was used as the basis for the issuance of a search warrant in a "numbers" case.

There are other facets of this case which in passing should be mentioned. At the trial of this case the officer testified that on the date of his lone, sole and uncorroborated observation, he saw a three by five pad on which were three numbers written and quoting verbatim from the transcript at page ten of the volume of the transcript wherein the hearing of the motions before trial are recorded, the officer said, "I observed all the numbers at that time -- but one of them I kept in my mind was 863 for twenty-five cents". Now isn't it strangely peculiar that the officer knew when he applied for the search warrant that there was a particular numbers play and an amount beside that numbers play which he had absolutely seen and remembered; yet he made no mention of this crucial bit of evidence when he executed the affidavit in support of the application for the warrant? There is no evidence that he made any notes when he made this crucial observation, so it must be assumed that he relied on his memory in recollecting this matter when he testified--can it be gainsaid that his memory on January 25, 1956, when he applied for the warrant was indeed better than it was on June 15, 1956 when he testified at the hearing on the motion before Judge Tamm?

The other facet which we think deserves mention and comment is the fact that there was absolutely no testimony which even suggested that there had been attempted other observations between January 16, 1956 and the 25th of January, 1956, when the officer applied for the warrant; likewise, there is a complete absence of any evidence which

even suggest that the officer even attempted to make corroborative observations between the time of the issuance of the search warrant and the date on which the warrant was executed. This is singularly strange and peculiar because in the absence of any evidence showing that appellants were engaged in the numbers game, other than the lone observation, it would appear that the Commissioner might very well have raised his "judicial eyebrows" so to speak and inquired of his own motion as to the failure to at least attempt to confirm and corroborate this officer's suspicions and beliefs as to the alleged numbers activity being carried on at the premises involved.

Summarizing this point about the search warrant, it seems proper to cite some of the other cases frequently relied on to maintain the position of the government in cases of this kind. We have already cited Wyche, supra, and have attempted to distinguish that case from the instant one. Turning now to Mills vs. United States, 90 U.S. App. D.C. 365, 196 F.2d. 600, (1952), we find that the late Judge Proctor, in rendering the opinion of the Court, had the following to say:

"First, there was information imparted to the officers by a citizen, which fairly well identified appellant and charged him with 'picking up numbers'. *****Evidently the officers took the information seriously, for they acted upon it, not recklessly, by making an immediate arrest, but cautiously by following appellant's movements on five different days. *****We are impressed too by the fact that the officers continued their surveillance of appellant for five days. We think that indicated a fair sense of caution and responsibility which, in turn, lends weight to the view that they acted reasonably in the circumstances."

In this quotation from this Mills case, which this Court has frequently cited and reaffirmed in later decisions, we have what we believe to be a good criteria relating to observations in the case of suspected violations of the lottery laws. Although this case involved the arrest of the appellant Mills without a warrant it still enunciates principles

equally applicable to issuance of search and arrest warrants upon what constitutes probable cause.

Too, we say that the trial Court apparently relied on the ruling of Judge Laws in the Bell case, (the Bell case was recently decided affirming as to all appellants, save appellant Shay), because the trial Court cited the Bell case lower-Court ruling and also the Nuchols case. In Nuchols vs. United States, 69 App. D.C. 120, 99 F.2d 353, cert. denied, 305 U.S. 626, the facts are clearly distinguishable from the instant case because in Nuchols, all five of the claimed grounds of appeal were, as the Court, in a Per Curiam opinion said, technical, and urged that the search warrants were illegally issued and illegally served and executed. In this Nuchols case the appellants were contending that, first, the warrants should have been sworn to before a Judge of the Police Court rather than before the United States Commissioner; we make no such contention here; secondly, appellants in that case contended that the time elapsing between the alleged unlawful acts and the issuance of the search warrants was unreasonable and unlawful; we make no such contention here; thirdly, in Nuchols, appellants contended that the language used in the affidavit executed in support of the application for the search warrants failed to spell out, in effect, the felony alleged to have been observed; we make no such contention here; fourth, appellants claimed that there was a lack of particularity relating to the description of the property ordered to be seized; we make no such contention here; fifth, and lastly, in Nuchols, the appellants contended that the search warrants, even if valid when they were issued, were improperly and unlawfully executed in that the warrants were not executed by the United States Marshal; we make no such contention here. Surely, then, it can hardly be urged that this case is adequate authority regarding the warrant in the instant case.

It is noteworthy, in examining some of the cases, that counsel for the government in cases of this kind rely in great measure on Brinegar vs. United States, 1948, 338 U.S. 160, 175, 176, 69 S.Ct.

1302, 1310, 93 L. Ed. 1879, and on the Carroll case, Carroll vs. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790. However, these two cases are easily distinguishable from the instant case because in both the Brinegar case and the Carroll case, arresting officers were dealing with persons who were peculiarly known to them, and in both of these cases cited frequently by the government, the agents had had prior dealings with appellants relative to the sale and purchase of the very contraband for which the appellants were arrested. In the Carroll case, we have the agents stopping appellant in the same car which had figured in a prior case or at least a prior attempted sale of contraband liquor. In Brinegar, we have the agents stopping the appellant on a public highway, after a chase (appellant having been personally known to the agents as a bootlegger), and even, in this case, although the agents had no warrant, the appellant stated in answer to a query as to how much liquor he had in the car, -- "not too much" or "not so much". On these facts these cases distinguish themselves from the instant one.

II.

The Court Committed Prejudicial and Reversible Error When it Refused to Give Defendants' Requested Instruction Number Two Relating to the Quantum of Proof Necessary to Establish a Prima Facie case and that Measure of Proof Necessary to Establish Guilt of the Defendants Beyond a Reasonable Doubt.

Turning now to the refusal of the Trial Judge to give a requested instruction (set out below), we urge that when the Court refused to give this requested instruction and failed in his general charge to give instructions covering this point, the Court in fact committed prejudicial and reversible error. The requested instruction was:

"DEFENDANTS' INSTRUCTION NUMBER TWO

You are further instructed as a matter of law that the mere fact that you may be convinced that the government has made out a prima facie case against any or all of the defendants should not persuade you that any or all of these defendants are guilty; you must go beyond this prima facie showing and find from the evidence that the government has proved its case to your satisfaction beyond a reasonable doubt. True, the law says that the mere possession of numbers paraphernalia constitutes prima facie evidence of operation of a lottery, but to convict these defendants as they are charged in this indictment, you must conclude that they were in fact engaged in the operation of a lottery contrary to the laws governing operation of lotteries."

We say that this instruction was a fair one and the refusal to give it and likewise the failure on the part of the Court to give any instruction on this vital aspect of the statute had the effect of sending the case to the jury against these appellants notwithstanding the fact that the jury had not been told about the essential difference between the quantum of proof necessary to make out a prima facie case and that considerably greater quantum of proof necessary to a finding of guilt beyond a reasonable doubt on the more serious charge of operating a lottery. To put it another way, we say that the fair intendment of this instruction was to make abundantly clear to the jury that even if they concluded and determined that the appellants were guilty of possession of lottery or numbers slips and/or numbers paraphernalia, then they would still be duty bound under the law to go beyond that point and find as a matter of fact and law, based upon the evidence presented and received, that the government had also made out a case against the appellants beyond a reasonable doubt on the charge of operating a lottery. Certainly, it can hardly be said, without more than we have here in this case, that the same evidence which is sufficient to support the charge of possession of numbers paraphernalia, must of necessity, also suffice to support the charge of operating a lottery. See Neely vs. United States, 80 U.S. App.

D.C. 187, 150 F. 2d 977, (1945), quoting definition of term, "prima facie evidence", as found in Justice Story's opinion rendered in Kelly vs. Jackson, 6 Peters 622, 632, 31 U.S. 622, 632, 8 L.Ed. 523.

Adverting to the Rule 30 of the Federal Rules of Criminal Procedure, and many annotations to be found in every treatise where the Federal Criminal Rules are embodied and elaborated upon, among some of these annotations we find many, many expressions defining the import and general content of this rule. In Kenion vs. Gill, 1946, 81 U.S. App. D.C. 96, 155 F. 2d 176, it was held to be reversible error where the trial Court failed to define various crimes involved in an indictment for murder, and also failed to define elements of each, this case citing with approval Williams vs. United States, 1942, 76 U.S. App. D.C. 299, 131 F.2d 21. To like effect insofar as adequacy of instructions in criminal cases are concerned, see especially, McAffee vs. United States, 1939, 70 U.S. App. D.C. 142, 105 F. 2d 21, in which case the late Judge Stephens was at great pains to spell out the requisites underlying instructions in criminal cases. Hardly, a more scholarly and erudite exposition on instructions, is to be found anywhere in any legal treatise. In this opinion the learned Judge explored the entire field of instructions particularly applicable to murder prosecutions and instructions which should be given in every criminal case. This Court is quite familiar with this McAffee opinion, which had strong dissents, and specific quotation of particular parts of that opinion does not appear to be necessary other than to set out below excerpts as they appear relevant to what now appears (after a re-reading of the trial Judge's charge in the instant case) to be an after-thought on the part of counsel for the appellant.

Rule 52 (b) of the Federal Rules of Criminal Procedure provide for Notice of plain errors by the appellate Court even where such errors were not brought to the attention of the trial Court. We respectfully submit that the charge of the trial Judge in this case is also open to attack, in that, only at one place in the charge do we find any statement

to the effect that the appellants or any of the other defendants in the lower Court should be found not guilty; nor is there any statement in the charge that the defendants should be acquitted unless the jury found beyond a reasonable doubt that all of the elements of some crime existed. At page 150 of the transcript, we find the only language of the Judge in his charge concerning the proposition that the defendants could be found innocent. The trial Judge used this language:

"If after weighing and considering all the evidence in this case you cannot say that you are satisfied of the guilt of the defendants, then you have a reasonable doubt and should find them not guilty."

This quoted excerpt of the Trial Judge's charge is weak, to say the least and we respectfully submit that it fails to meet the test and criteria as to what is the minimal requirement on this point. In McAfee, supra, the Court said:

"And it is true that nowhere in the instructions were the jury in terms told that unless they found beyond a reasonable doubt that all of the elements of some crime existed, they must acquit the defendant. The jurors were told in one place: 'Of course, if you do not find that the defendant struck the fatal blows, that is the end of the case and you needn't spend any more time on it. If you find he did strike the fatal blows, then I instruct you as a matter of law he is guilty of criminal homicide, and the only question for to determine is which degree it was, whether first or second degree, or manslaughter.'"

After setting out the excerpt from the trial Judge's charge in this McAfee case, the appellate Court went on to state in its majority opinion that:

"Notwithstanding this, it is the view of Associate Judges Miller and Vinson and myself that the contention of the defendant in this aspect of the case is meritorious. We think it should be orthodox practice somewhere in the instructions to tell the jury in precise terms that a not guilty verdict is necessary in the event of failure by the government to prove each of the elements of some offense beyond a reasonable doubt. While this was implied in the language last above quoted, it was not, in our view, stated with sufficient explicitness."

Here in the instant case we have what might be construed, by implication, as telling the jury that they might acquit the defendants, but certainly there is a lack of explicitness (using the language of Judge Stephens in McAfee) with no explanation as to the various elements constituting the various offenses set out in the indictment. Therefore we would urge this as further reasons for a reversal of this judgement.

CONCLUSION

Wherefore, it is respectfully submitted and urged upon this Court that the judgments against these appellants should be reversed, as to all counts of the indictment.

Respectfully submitted,

WESLEY S. WILLIAMS

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(i)

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APPENDIX

THE SEARCH WARRANT:

Affidavit in support of application for search warrant:-----

"Statement of facts relative to request for U. S. Commissioner's Search Warrant for the premises 4451 Deane Avenue, N.E. (entire premises) Washington, D.C. and arrest warrant for the individual named herein for violation of the lottery law of the District of Columbia. Having received information from reliable source that a numbers operation was taking place on the premises 4451 Deane Avenue, N.E. Pvt. Felix Aiken was assigned to investigate.

Monday, January 16, 1956 at about 12:10 P.M. Pvt. Felix R. Aiken went to the premises of 4451 Deane Avenue, N.E. While on the premises Pvt. F. R. Aiken observed King, Elton Franklin, a known numbers operator sitting at a desk with a large stack of numbers slips in front of him and a bag containing several dollars in change. When King saw Pvt. Aiken he immediately placed the stack of number slips into his right inside coat pocket and attempted to cover a pad that was lying on the desk. This pad had three numbers plays written on it with sums of money opposite the figure.

It is the belief of the undersigned officer that premises 4451 Deane Avenue N.E. located in the District of Columbia, is now being used to conduct a policy lottery and that numbers slips and/or other numbers paraphernalia are now being secreted in this premises, in violation of the lottery laws of the District of Columbia and the aforementioned person is actively engaged in the operation of a policy lottery. I believe that the individual named herein is the owner or operator of the above premises. FRA

/s/ Felix R. Aiken

/t/ Felix R. Aiken

Morals Division, MPDC

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 25 DAY OF JANUARY 1956.

/s/ Cyril S. Lawrence

/t/ Cyril S. Lawrence

UNITED STATES COMMISSIONER FOR THE DISTRICT OF COLUMBIA
COPY 10802"

THE INDICTMENT:

*****On or about February 3, 1956, within the District of Columbia, Elton F. King, Thomas Ballenger, John H. Thomas, David Golden, Lewis H. Woodard, William J. Hill, Clarence E. Lipscomb, Lawrence E. Brown, Ethel Lee Collins and Emma Bess were concerned as owners, agents and clerks, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game.

On or about February 3, 1956, within the District of Columbia, Elton F. King knowingly had in his possession and under his control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, used and to be used and adapted, devised and designed for the purpose of playing, carrying on and conducting a lottery known as the numbers game.

On or about February 3, 1956, within the District of Columbia, John H. Thomas knowingly had in his possession and under his control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, used and to be used and adapted, devised and designed for the purpose of playing, carrying and conducting a lottery known as the numbers game.

On or about February 3, 1956, within the District of Columbia, Elton F. King engaged in the business of accepting wagers, and, by reason of such activity, was required by law, on or before February 3, 1956, to pay to the Director of Internal Revenue for the Internal Revenue Collection District of Maryland the occupational tax of \$50.00 imposed by Title 26, United States Code, Section 4411, on persons engaged in receiving wagers; and at the time and place aforesaid the said Elton F. King did fail to pay the said special tax to the said Director of Internal Revenue in violation of Title 26, United States Code, Section 7262.

On or about February 3, 1956, within the District of Columbia, John H. Thomas engaged in the business of accepting wagers, and, by reason of such activity, was required by law, on or before February 3,

1956, to pay to the Director of Internal Revenue for the Internal Collection District of Maryland the occupational tax of \$50.00 imposed by Title 26, United States Code, Section 4411, on persons engaged in receiving wagers; and at the time and place aforesaid the said John H. Thomas did fail to pay the said special tax to the said Director of Internal Revenue in violation of Title 26, United States Code, Section 7262.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,603

ELTON F. KING, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 13,604

JOHN H. THOMAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 4 1957

Joseph W. Stewart

CLERK

OLIVER GASCH,

United States Attorney.

LEWIS CARROLL,
HAROLD H. TITUS, JR.,
JOHN D. LANE,

E. TILLMAN STIRLING,
Assistant United States Attorneys.

QUESTIONS PRESENTED

At a pretrial hearing on a motion to suppress evidence, a police officer testified that while in a part of a gasoline station to which the public is invited, he saw appellant King in possession of lottery paraphernalia. He subsequently obtained a search warrant and an arrest warrant, and when the warrants were executed the evidence sought to be suppressed was found in the premises and in the possession of the appellants.

In the opinion of the appellees, the following questions are presented:

1. Was the motion to suppress properly denied.
2. Were the instructions complete and proper.

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*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On April 30, 1956 appellants were indicted in three counts with operating or being concerned with a lottery in violation of D. C. Code § 22-1501, and with possession of numbers slips in violation of D. C. Code § 22-1502, and with accepting wagers without having paid the occupa-

tional tax in violation of 26 U.S.C. 4411. After a full hearing on appellants' motion to suppress the evidence, the court on June 27, 1956 denied the motion. Trial by jury started on October 3, 1956 and on October 5 the jury returned a verdict of guilty on all counts with respect to both appellants, and on November 11, 1956 appellant Thomas was sentenced to serve from 5 to 15 months imprisonment on Count One; one year on Count Four to run concurrently with the sentence imposed on Count One, and to pay a fine of \$1,000.00 on Count Fourteen. Appellant King was sentenced to serve 8 to 24 months imprisonment on Count One; one year on Count Two, concurrent with Count One, and to pay a fine of \$1,000.00 on Count Twelve. This appeal follows.

Private Felix R. Aiken testified at the pretrial hearing on the motion to suppress the evidence that on January 16, 1956 he had occasion to go to the gasoline station at 4451 Deane Avenue, Northeast, Washington, D.C. at about 12:10 p.m. (R. 4). Upon entering the office of the gasoline station in order to go to the public restroom, Officer Aiken stated that he observed appellant King seated at a desk with several regulation numbers slips to his left; a pencil in his right hand, and a bag containing some change and bills. He further observed a three by five inch white pad on which three numbers were written. One of the numbers was "836 for twenty-five cents." (R. 9). Upon seeing the officer, King "grabbed" the regulation numbers slips and placed them in his coat pocket and attempted to cover the pad that was in front of him (R. 10). Officer Aiken further testified that he subsequently obtained a search warrant for the gasoline station and an arrest warrant for King, and on February 3, 1956 the warrants were executed (R. 15). Officer Aiken said he has seen many numbers slips and based on his past experience recognized the slips he saw in King's possession as being numbers slips (R. 18).

Sergeant Michael Molesky, testified at the pretrial hearing that he was present at the gasoline station on February 3, 1956 at 1:28 p.m. when the search warrant was executed. He stated that he arrested appellant Thomas (R. 20) inside

of the office, and recovered a large quantity of numbers slips from him (R. 21). He also stated that numbers slips were found on the floor and some run-down tapes were found in the cash register. Numbers slips were also found in a metal container which was outside the office. (R. 24-25).

Officer Aiken was recalled and testified that when the raid was made on the gasoline station on February 3, 1956 he had an arrest warrant for King as well as the search warrant for the premises. He arrested King. (R. 63.) During the course of the raid Officer Aiken said a woman called and asked when King was coming to pick up her work. The officer told her that King was going to be tied up for a while. The woman then said, "It is getting late. Somebody had better." Officer Aiken offered to come by and pick up her work so she gave him her address and he and Private McElvane drove to the address and picked up the numbers slips from the woman and another woman together with a bag of money. After receiving a package of slips from each the two officers placed them under arrest. (R. 66-67.) The two women, Ethel Lee Collins and Emma Bess, were convicted on the same charges as were the appellants.

Private Henry McElvane, (R. 42-52, 87-99), *Lieutenant George Causey* (R. 69-72), and *Private Vernon Reynolds* (R. 74-82, 100-115), all testified concerning the execution of the search and arrest warrants. In all, ten defendants were caught and indicted as a result of the raid on the gasoline station on February 3, 1956, and much of the testimony concerns the details of the arrests of the other defendants who are not appealing. Prior to the pretrial hearing both appellants filed affidavits stating that certain papers were taken from them during the raid on February 3, 1956. At the close of the hearing the motions to suppress were denied.

At the trial the officers gave similar testimony to that which they had given at the pretrial hearing. In addition, *Captain Todd O. Thoman*, Metropolitan Police Department, qualified as an expert on the numbers game and the para-

paraphernalia therein used (R. 235, 237). He then identified Government Exhibit Number 10 (the paraphernalia taken from appellant King) as numbers slips and run-down tapes (R. 243). He further identified Government Exhibit Number 14 (the paraphernalia taken from appellant Thomas) as being numbers slips (R. 244-245).

At the close of all the evidence appellant offered a proposed instruction (Defendants' Instruction Number Two) which the court denied (R. 263). However, appellant then stated that since the court would not give the instruction he would argue it in his closing statements to the jury. The court made no objection to this procedure and, although the closing arguments were not transcribed, appellant presumably covered the point in his argument.

After charging the jury (R. 265-275) the following colloquy ensued (R. 274):

The COURT: Gentlemen, have I covered it?

Mr. WILLIAMS: I think you have.

Mr. TITUS: Yes.

The COURT: Are you satisfied, Mr. Williams?

Mr. WILLIAMS: Yes.

After deliberation the jury returned a verdict of guilty.

STATUTES INVOLVED

District of Columbia Code, § 22-1501 (1950 Ed.) provides:

Lotteries—Promotion—Sale or possession of tickets.

—If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell

or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

District of Columbia Code. § 22-1502 (1950 Ed. Supp. IV) provides:

Possession of lottery or policy tickets.—If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

SUMMARY OF ARGUMENT

In an affidavit in support of an application for a search warrant, a police officer stated that while on the premises of appellant King, a known numbers operator, he saw King in possession of lottery paraphernalia. Although the officer had statutory authority to arrest King at that time, he first obtained a search warrant and arrest warrant. There is no question that when the officer saw the crime

being committed, he had probable cause to obtain the warrants. Much less than actual sight of the crime being committed has been held to constitute probable cause for obtaining a warrant.

After the court charged the jury, appellant stated that he was satisfied. His present allegations that the court should have more fully explained the meaning of "prima facie", and should have told the jury more than just one time that they could find the appellants not guilty are not in accordance with the previous decisions of this Court. The charge as given was complete and correct.

ARGUMENT

I

Probable Cause Was Established by Direct Observation of the Commission of the Crime

Appellants' first argument is that the evidence should be suppressed because the search warrant was not based on probable cause in the particular that it was issued on the affidavit of an officer who swore to but "one isolated observation on the premises" subsequently searched (Br. 5). In support of this contention appellant cites such cases (*e.g.*, Br. 11) as *Mills v. United States*, 90 U.S. App. D.C. 365, 196 F.2d 600 (1952).

The argument runs that in such cases as the *Mills* case the officer made more than one observation. Where a police officer's surveillance affords but circumstantial evidence that a criminal enterprise is being conducted at a particular place, naturally the number of such observations may be relevant to determine whether an affidavit is sufficient to establish probable cause. Further, where application for a search warrant is based on hearsay, an affidavit may be examined for indications of reliability of information imparted to the officer. But where, as here, an officer actually witnesses the commission of the crime, and his affidavit so reflects, such cases have no bearing.

It is not frequent that an officer has an opportunity to see directly a lottery in operation, and must rely ordinarily on

observations affording circumstantial indications of the existence of the criminal enterprise. It is in recognition of this pragmatic principle that it has been held "The existence of probable cause does not require that the officer then possess legal evidence sufficient to convict." *Washington v. United States*, 92 U.S. App. D.C. 31, 32, 202 F.2d 214 (D.C. Cir.), *cert. denied*, 345 U.S. 956 (1952). Here there was legal and sufficient evidence of guilt and therefore, for a stronger reason than those advanced in the cases relied on by appellant, probable cause was established. Observations may be many, or few, and in a particular case may amount only to suspicion. If an officer witnesses the commission of the crime itself probable cause is eminently established and the number of observations is irrelevant.

It is fruitless to compare a case where commission of a crime was directly observed with those dealing with the sufficiency and number of observations indicating circumstantially the existence of a criminal enterprise. Therefore there is no basis for appellants' argument because it calls for the comparison of unlike situations. In perspective what appellants urge as weakness is actually strength, probable cause having been more than amply demonstrated.

II

There Was No Error in the Charge

In the lottery statute there is a statutory presumption whereby possession of numbers slips is constituted "prima facie evidence" of operating a lottery.¹ At the close of the evidence appellants proffered a written requested instruc-

¹"... The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery." 31 Stat. (1901), as amended, 22 D.C. Code § 1501 (1951).

tion² in which they asked that the jury be told that even if "convinced that the government has made out a *prima facie* case" they "must go beyond this *prima facie* showing and find from the evidence that the government has proved its case . . . to convict these defendants . . . you must conclude that they were in fact engaged in the operation of a lottery" (Appellants' Br. 14) .

Appellants now urge the denial of this requested instruction was error (Br. 13). It is observed that the instruction misstates the law concerning statutory presumptions. Appellants' suggested instruction did not ask that the jury be told such presumptions are rebuttable, which, of course, they are. However, by elementary definition a jury *may* deduce the ultimate fact, there the operation of a lottery, where it has found the underlying fact on which the presumption is based. To say it *must* then go forward is to circumscribe the jury's power and to misstate the law. Courts are not required to correct mistaken instructions.³ Further, in the particular area which the request covered, it has been held that a charge based on the language of the statute is sufficient.⁴

It is significant in more than one particular that upon denial of the requested instruction appellants asked and received permission to "argue the point rather than have Your Honor give it as a proposition of law" (R. 262). This was in recognition that the instruction was argumentative in its aspect of singling out particular evidence in order to minimize it.

As detailed in the counterstatement, at the close of the charge appellants affirmatively stated their agreement with it as rendered. This statement, in the light of the previous permission accorded to develop before the jury the substance of their requested instruction and their prior recog-

² The instruction is reproduced in appellants' brief at page 14.

³ *Sweeney v. Erving*, 228 U.S. 233, *affirming* 35 App. D.C. 57 (1919).

⁴ *Maynard v. United States*, 94 U.S. App. D.C. 347, 215 F.2d 336 (1954); *Terminal R. Ass'n. of St. Louis v. Howell*, 165 F.2d 135, 140 (8th Cir. 1948).

nition that it was argumentative, put the instant case squarely within the policy of *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950), requiring, in accordance with Rule 30, Federal Rules of Criminal Procedure that defects in a charge be distinctly pointed out before a jury retires.

In view of the permission given to argue the point, which presumably was adequately done in his argument, if error be assumed it manifestly did not affect substantial rights. Fed. R. Crim. P. 52(a). Therefore, the record clearly shows that the charge as given was correct and proper.

Appellants' allegation (Br. 15-16) that it was error for the court to tell the jury only once that they could return a not guilty verdict is not well taken. In *McAffee v. United States*, 70 App. D.C. 142, 150, 105 F.2d 21 (1939) this Court indicated that such an instruction should be given once, but did not indicate that it was necessary to repeat it.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
HAROLD H. TITUS, JR.,
JOHN D. LANE,
E. TILLMAN STIRLING,
Assistant United States Attorneys.

BRIEF AND APPENDIX FOR APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 9 1951

No. 13, 603

Joseph W. Stewart
CLERK

ELTON F. KING,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

645

No. 13, 604

JOHN H. THOMAS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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(i)

STATEMENT OF
QUESTIONS PRESENTED

1. Was the motion to suppress the evidence and to quash the search warrant improperly denied?

2. Did the Court commit prejudicial and reversible error when it refused to give defendants' requested instruction relating to the quantum of proof necessary to establish a prima facie case and that measure of proof necessary to establish the guilt of the defendants beyond a reasonable doubt?

3. Was there any instruction given, with sufficient explicitness, to the effect that the defendants could be found innocent if the government failed to prove each and every element of the crimes charged?

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UNITED STATES COURT OF APPEALS
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ELTON F. KING,

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF AND APPENDIX FOR APPELLANTS

JURISDICTIONAL STATEMENT

These appeals are from the judgment and sentence imposed upon the appellants, Elton F. King and John H. Thomas, after a trial by jury before the Honorable Joseph C. McGarraghy, Judge, United States District Court for the District of Columbia, and a sentence imposed as follows: Elton F. King, sentenced to imprisonment for a period of

eight (8) months to twenty-four (24) months on Count One; One year on Count Two, said sentence to run concurrently with the sentence imposed in Count One; and to pay a fine of one thousand (\$1,000) dollars on Count Twelve. John H. Thomas, sentenced to imprisonment for a period of Five (5) months to Fifteen (15) months on Count One; One year on Count Four, said sentence to run concurrently with the sentence imposed in Count One; and to pay a fine of one thousand (\$1,000) dollars on Count Fourteen.

Jurisdiction is vested in this Court by Title 28, U.S. Code, Section 1291, and Rule 37, Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

The facts are substantially as follows: A member of the Metropolitan Police Department made application for and received a search warrant for the premises described as King Brothers Service Center located at 4451 Deane, Avenue, N.E., Washington, D.C., this officer asserting in the affidavit in support of the application for the search warrant that, on January 16, 1956, he, having received "reliable" information that a numbers lottery was being conducted on the aforementioned premises, made certain observations of these premises; that he made no other observations except on this date; that on this date he saw certain conduct on the part of the appellant King which convinced him that a lottery was being conducted on these premises; that he accordingly went to the United States Commissioner and made affidavit as to what he saw going on in the premises and secured a search warrant for these premises. This officer stated in his application for the search warrant that he had on January 16, 1956, entered upon the premises and went to the men's room and that while en route there he saw the appellant King sitting at a desk; that to the left of King there were what he characterized as "regulation" numbers slips, and to his right he had a pencil in his right hand, and to the right there was a bag and this bag contained some change and bills. This officer stated further in his affidavit in support

of his application for the search warrant that in the center of the table there was a three by five pad which had three numbers on it; further, that when he, the officer came out of the rest room and approached the desk where the appellant King was sitting, the appellant, King, grabbed the so-called numbers slips and placed them in his coat pocket and attempted to cover up the pad referred to above. Having secured the search warrant the officer in company with other officers went to the premises on February 3, 1956 and there arrested the appellants King and Thomas, along with others, and seized certain paraphernalia allegedly used or to be used in the operation of a so-called lottery.

This officer testified, and it is undisputed, that it was the sole and single observation made on January 16, 1956, upon which he, the officer, made the affidavit in support of the application for the search warrant; further, that the alleged "reliable" source of his original information was not disclosed or identified.

Appropriate motions were duly made to suppress the evidence, to quash the search warrant, for judgment of acquittal at the close of the government's case and again at the close of the entire case; motion for new trial and/or judgment of acquittal was made after the verdict of the jury and prior to imposition of sentence; all of these motions were denied. None of the defendants took the witness stand.

STATEMENT OF POINTS

1. The search warrant issued in this case did not show on its face probable cause for the issuance of the same; accordingly, the motion to quash the warrant and to suppress all evidence obtained under it should have been granted.

2. Defendants' requested instruction number Two should have been granted and the refusal of the Trial Judge to grant same had the effect of sending the case to the jury without defining to the jury the important difference between what constitutes "prima facie" proof, and what proof is necessary to establish guilt beyond a reasonable doubt.

3. There was no explicit instruction that defendants could be found innocent.

SUMMARY OF ARGUMENT

1. Where persons suspected of carrying on an illegal operation of the lottery game are admittedly also engaged in the operation of a perfectly legal business at premises licensed as a gas station, it would appear that something more than one lone observation by a police officer, unaccompanied by any other officer or person in authority, should be required before issuing a search warrant for the premises in question.

2. The statutes under which these appellants were charged with lottery violations used the words "prima facie"; this term is not a common everyday expression readily understandable by laymen; therefore, the jury should have had the benefit of an instruction from the Court as to the legal denotation and connotation of such legalistic terms.

3. Except for the following quotation, "If after weighing and considering all the evidence in this case you cannot say that you are satisfied of the guilt of the defendants, then you have a reasonable doubt and should find them not guilty.", (TR 150), there was no instruction, in terms, with sufficient explicitness, to the effect that the defendants or any one or more of them could be found innocent or not guilty.

ARGUMENT

Notwithstanding the number of defendants originally named in the indictment, and notwithstanding the number of Counts in that indictment, it appears that this appeal really involves two questions affecting, we say, the substantial rights of appellants here. The number of defendants and the number of counts in this indictment might suggest, inferentially, at least, that this case is an involved and complicated matter but, on analysis, for our purposes, it appears to be a rather simple case raising, as is usual in cases where search warrants are executed, etc.,

issues going to the validity of such warrants and the matter of probable cause for the issuance of such search warrants. The other matter concerns the refusal to give what we consider to be an important instruction covering the law, insofar as it relates and defines the very different tests to be applied in establishing, first, a prima facie case, and secondly, establishing and proving the case to the satisfaction of the jury far beyond the prima facie showing, and indeed to the point of "beyond a reasonable doubt".

I.

The Motion To Suppress The Evidence and to Quash the Search Warrant Was Improperly Denied, Both Preliminarily, Prior to Trial, and Again, When the Same Motion Was Renewed at the Trial on the Merits.

It is conceded that nowhere do we find any hard and fast rule postulated by the Courts spelling out with precision what constitutes probable cause for the issuance of a search warrant.

The substantial questions of law involved in this appeal are as follows: that in the absence of more than this one isolated observation of the premises and the appellant, King, it can hardly be said that there was sufficient probable cause for the formulation of a belief on the part of the officer that a lottery was being conducted on the premises: further, that there is nothing in the record of either the preliminary proceedings, or the trial, to show that the alleged "reliable" source of information was indeed "reliable", or that the officer had checked into the reliability of this source of information, or that the officer had ever on any other occasion acted upon the information from this source and found the information to be, in fact, "reliable". That this search warrant never should have been issued on the sole observation of the officer because even assuming that the officer saw what he claimed to have seen, certainly did not furnish any basis for the United

States Commissioner to conclude that probable cause existed for the issuance of a search warrant of the premises where the appellant, King, was concededly operating a business which was lawful and properly licensed in all respects; that the issuance of the search warrant in this case was not justified by the evidence before the Commissioner when he issued said warrant, and that the issuance of the warrant was in violation of the appellant's constitutional rights under the Fourth Amendment to the Constitution of the United States; also, the issuance of this warrant does violence to the appropriate rule of the Federal Rules of Criminal Procedure applicable here, that is, Rule 41(c), F.R.C.P., as amended.

While the government in the preliminary proceedings and the actual trial below made no issue of it, we state at the outset that these appellants and both of them are "persons aggrieved" and as such have standing to complain relative to the issuance and execution of this search warrant which they say violated their rights. (Rule 41(c) of the Federal Rules of Criminal Procedure).

Turning then to the gravamen of this appeal, we state at the outset that we recognize that in all appeals, just like in petitions for the writ of certiorari to the Supreme Court, we are confined to the question as to whether there is a substantial question of law involved and of such import that it can fairly be said that even one judge on the appellate level may entertain some misgivings concerning the correctness of certain rulings made either in the proceedings preliminary to trial or in the trial itself.

In support of our contention that there did not exist probable cause for the issuance of this search warrant, we contend that the search warrant issued herein is not supported by an affidavit evidencing on its face probable cause for the issuance of the same; that the evidence seized under the search warrant was in fact, and in law, seized in derogation of the rights of these appellants under the Fourth Amendment to the Constitution of the United States.

The affidavit is insufficient on its face to show probable cause for the issuance of a search warrant. The affidavit is as follows:

*****"Having received information from reliable source that a numbers operation was taking place on the premises 4451 Deane Avenue, N.E., Pvt. Felix R. Aiken was assigned to investigate. Monday, January 16, 1956 at about 12:10 P.M. Pvt. Felix R. Aiken went to the premises of 4451 Deane Avenue, N.E. While on the premises Pvt. F. R. Aiken observed King, Elton Franklin, a known number operator sitting at a desk with a large stack of numbers slips in front of him and a bag containing several dollars in change. When King saw Pvt. Aiken he immediately placed the stack of numbers slips into his right inside coat pocket and attempted to cover a pad that was lying on the desk. This pad had three numbers plays written on it with sums of money opposite the figure.

It is the belief of the undersigned officer that premises 4451 Deane Avenue N.E. located in the District of Columbia, is now being used to conduct a policy lottery and that numbers slips and/or other numbers paraphernalia are now being secreted in this premises, in violation of the lottery laws of the District of Columbia and the aforementioned person is actively engaged in the operation of a policy lottery. I believe that the individual named herein is the owner or operator of the above premises.

/s/ Felix R. Aiken
/t/ Felix R. Aiken
Moral Division, MPDC

Jurat".

In substance the affidavit states that having received "reliable" information the officer went to the premises described in the warrant on January 16, 1956, made certain observations; then without indicating that any other observations were made, swore to the aforementioned affidavit and secured a search warrant on January 25, 1956, and executed said warrant on February 3, 1956. It is noted that approximately eighteen

days elapsed between the date of the alleged observations and the execution of the warrant. Also, it is to be noted that, again, without further observations alleged in the affidavit, application for the warrant was not made until eight days after the original observations.

It is to be anticipated that the government counsel may choose, among other cases, to rely on Wyche v. United States, 90 U.S.App.D.C. 67, 193 F.2d. 703(1951), but in that case, although the facts appear to be somewhat analogous, there were three days of observations, and it is also significant that more than one police officer, and indeed their informant executed affidavits in securing warrants.

Here in the instant case, we have a lone police officer going into a public place where legitimate business was being conducted, (a gasoline station) and later swearing that an illegal business was being also conducted there. It is just as consistent with a legitimate purpose as it is with an illegitimate purpose that the officer allegedly saw the appellant King handling money and slips or pieces of paper. It is also noted that in Wyche v. United States, supra, the Court in its opinion, stated, among other things, "By personal observation, the officers who conducted the search and made the arrests carefully checked the information they had received from the informant." In this case we have no such allegation in the affidavit nor do we find any other indication that the alleged information received from the informant was "reliable" other than the officer said it was so.

Furthermore, this gasoline station was and is a public place not under the exclusive control of the appellant, King, at all times. There is no evidence to show that the people who were arrested as they came in the premises on February 3, 1956 were coming there in order to transact "numbers" business with the appellant, King, or with any other person or persons, because even the officer, Aiken, stated in his affidavit that the appellant, King, was allegedly observed there alone, by himself, on the sole occasion, January 16, 1956, and there

is no suggestion that anyone else was there on January 16, 1956.

Another point which we think is important is the fact that the officer stated in his affidavit that he had observed the appellant, King, a known numbers operator; however, there is nothing in the record of this case, either preliminarily or at the trial, to show by what evidence he had discovered that the appellant, King, was a "known numbers operator".

This characterization of the appellant, King "as a known numbers operator", is entirely unsupported by anything appearing in the record of this case. There is no showing that the officer checked to see whether appellant, King, had ever been arrested or convicted for violations of the lottery laws or even that he was able to say that from past experience and/or so-called "reliable" information, he discovered that the appellant, King "was engaged then and there in the operation of a lottery commonly known as the 'numbers' game."

Finally, it is respectfully submitted that in securing a warrant to search premises such as we have here, where to all intents and purposes a legitimate business was being conducted, something more than one isolated observation of one lone alleged numbers operator is necessary before a prudent man could reasonably conclude that a "numbers" operation was being conducted on the premises. It is to be borne in mind that in the operation of a gasoline-station business that it is readily conceivable that persons operating such a business would be engaged every day in handling sales slips, adding machines, daily run-down tapes showing business transacted for any particular period, bags of change and bills, et cetera. There is nothing sinister about an owner or employee being seen daily with sales slips and other paraphernalia which might conceivably be mistaken for and confused and identified as items also used in the operation of the "numbers" game.

In any event, it is submitted that search and seizure is governed by the adjudicated cases, and an examination of all of the cases decided in this jurisdiction, where the question of probable cause for the issuance of a search warrant relating to "numbers" operations fails to disclose so far as we are able to determine, a single case where the lone observation of a police officer under the circumstances such as attend this case, was used as the basis for the issuance of a search warrant in a "numbers" case.

There are other facets of this case which in passing should be mentioned. At the trial of this case the officer testified that on the date of his lone, sole and uncorroborated observation, he saw a three by five pad on which were three numbers written and quoting verbatim from the transcript at page ten of the volume of the transcript wherein the hearing of the motions before trial are recorded, the officer said, "I observed all the numbers at that time -- but one of them I kept in my mind was 863 for twenty-five cents". Now isn't it strangely peculiar that the officer knew when he applied for the search warrant that there was a particular numbers play and an amount beside that numbers play which he had absolutely seen and remembered; yet he made no mention of this crucial bit of evidence when he executed the affidavit in support of the application for the warrant? There is no evidence that he made any notes when he made this crucial observation, so it must be assumed that he relied on his memory in recollecting this matter when he testified--can it be gainsaid that his memory on January 25, 1956, when he applied for the warrant was indeed better than it was on June 15, 1956 when he testified at the hearing on the motion before Judge Tamm?

The other facet which we think deserves mention and comment is the fact that there was absolutely no testimony which even suggested that there had been attempted other observations between January 16, 1956 and the 25th of January, 1956, when the officer applied for the warrant; likewise, there is a complete absence of any evidence which

even suggest that the officer even attempted to make corroborative observations between the time of the issuance of the search warrant and the date on which the warrant was executed. This is singularly strange and peculiar because in the absence of any evidence showing that appellants were engaged in the numbers game, other than the lone observation, it would appear that the Commissioner might very well have raised his "judicial eyebrows" so to speak and inquired of his own motion as to the failure to at least attempt to confirm and corroborate this officer's suspicions and beliefs as to the alleged numbers activity being carried on at the premises involved.

Summarizing this point about the search warrant, it seems proper to cite some of the other cases frequently relied on to maintain the position of the government in cases of this kind. We have already cited Wyche, supra, and have attempted to distinguish that case from the instant one. Turning now to Mills vs. United States, 90 U.S. App. D.C. 365, 196 F.2d. 600, (1952), we find that the late Judge Proctor, in rendering the opinion of the Court, had the following to say:

"First, there was information imparted to the officers by a citizen, which fairly well identified appellant and charged him with 'picking up numbers'. *****Evidently the officers took the information seriously, for they acted upon it, not recklessly, by making an immediate arrest, but cautiously by following appellant's movements on five different days. *****We are impressed too by the fact that the officers continued their surveillance of appellant for five days. We think that indicated a fair sense of caution and responsibility which, in turn, lends weight to the view that they acted reasonably in the circumstances."

In this quotation from this Mills case, which this Court has frequently cited and reaffirmed in later decisions, we have what we believe to be a good criteria relating to observations in the case of suspected violations of the lottery laws. Although this case involved the arrest of the appellant Mills without a warrant it still enunciates principles

equally applicable to issuance of search and arrest warrants upon what constitutes probable cause.

Too, we say that the trial Court apparently relied on the ruling of Judge Laws in the Bell case, (the Bell case was recently decided affirming as to all appellants, save appellant Shay), because the trial Court cited the Bell case lower-Court ruling and also the Nuchols case. In Nuchols vs. United States, 69 App. D.C. 120, 99 F.2d 353, cert. denied, 305 U.S. 626, the facts are clearly distinguishable from the instant case because in Nuchols, all five of the claimed grounds of appeal were, as the Court, in a Per Curiam opinion said, technical, and urged that the search warrants were illegally issued and illegally served and executed. In this Nuchols case the appellants were contending that, first, the warrants should have been sworn to before a Judge of the Police Court rather than before the United States Commissioner; we make no such contention here; secondly, appellants in that case contended that the time elapsing between the alleged unlawful acts and the issuance of the search warrants was unreasonable and unlawful; we make no such contention here; thirdly, in Nuchols, appellants contended that the language used in the affidavit executed in support of the application for the search warrants failed to spell out, in effect, the felony alleged to have been observed; we make no such contention here; fourth, appellants claimed that there was a lack of particularity relating to the description of the property ordered to be seized; we make no such contention here; fifth, and lastly, in Nuchols, the appellants contended that the search warrants, even if valid when they were issued, were improperly and unlawfully executed in that the warrants were not executed by the United States Marshal; we make no such contention here. Surely, then, it can hardly be urged that this case is adequate authority regarding the warrant in the instant case.

It is noteworthy, in examining some of the cases, that counsel for the government in cases of this kind rely in great measure on Brinegar vs. United States, 1948, 338 U.S. 160, 175, 176, 69 S.Ct.

1302, 1310, 93 L. Ed. 1879, and on the Carroll case, Carroll vs. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790. However, these two cases are easily distinguishable from the instant case because in both the Brinegar case and the Carroll case, arresting officers were dealing with persons who were peculiarly known to them, and in both of these cases cited frequently by the government, the agents had had prior dealings with appellants relative to the sale and purchase of the very contraband for which the appellants were arrested. In the Carroll case, we have the agents stopping appellant in the same car which had figured in a prior case or at least a prior attempted sale of contraband liquor. In Brinegar, we have the agents stopping the appellant on a public highway, after a chase (appellant having been personally known to the agents as a bootlegger), and even, in this case, although the agents had no warrant, the appellant stated in answer to a query as to how much liquor he had in the car, -- "not too much" or "not so much". On these facts these cases distinguish themselves from the instant one.

II.

The Court Committed Prejudicial and Reversible Error When it Refused to Give Defendants' Requested Instruction Number Two Relating to the Quantum of Proof Necessary to Establish a Prima Facie case and that Measure of Proof Necessary to Establish Guilt of the Defendants Beyond a Reasonable Doubt.

Turning now to the refusal of the Trial Judge to give a requested instruction (set out below), we urge that when the Court refused to give this requested instruction and failed in his general charge to give instructions covering this point, the Court in fact committed prejudicial and reversible error. The requested instruction was:

"DEFENDANTS' INSTRUCTION NUMBER TWO

You are further instructed as a matter of law that the mere fact that you may be convinced that the government has made out a prima facie case against any or all of the defendants should not persuade you that any or all of these defendants are guilty; you must go beyond this prima facie showing and find from the evidence that the government has proved its case to your satisfaction beyond a reasonable doubt. True, the law says that the mere possession of numbers paraphernalia constitutes prima facie evidence of operation of a lottery, but to convict these defendants as they are charged in this indictment, you must conclude that they were in fact engaged in the operation of a lottery contrary to the laws governing operation of lotteries."

We say that this instruction was a fair one and the refusal to give it and likewise the failure on the part of the Court to give any instruction on this vital aspect of the statute had the effect of sending the case to the jury against these appellants notwithstanding the fact that the jury had not been told about the essential difference between the quantum of proof necessary to make out a prima facie case and that considerably greater quantum of proof necessary to a finding of guilt beyond a reasonable doubt on the more serious charge of operating a lottery. To put it another way, we say that the fair intendment of this instruction was to make abundantly clear to the jury that even if they concluded and determined that the appellants were guilty of possession of lottery or numbers slips and/or numbers paraphernalia, then they would still be duty bound under the law to go beyond that point and find as a matter of fact and law, based upon the evidence presented and received, that the government had also made out a case against the appellants beyond a reasonable doubt on the charge of operating a lottery. Certainly, it can hardly be said, without more than we have here in this case, that the same evidence which is sufficient to support the charge of possession of numbers paraphernalia, must of necessity, also suffice to support the charge of operating a lottery. See Neely vs. United States, 80 U.S. App.

D.C. 187, 150 F. 2d 977, (1945), quoting definition of term, "prima facie evidence", as found in Justice Story's opinion rendered in Kelly vs. Jackson, 6 Peters 622, 632, 31 U.S. 622, 632, 8 L.Ed. 523.

Adverting to the Rule 30 of the Federal Rules of Criminal Procedure, and many annotations to be found in every treatise where the Federal Criminal Rules are embodied and elaborated upon, among some of these annotations we find many, many expressions defining the import and general content of this rule. In Kenion vs. Gill, 1946, 81 U.S. App. D.C. 96, 155 F. 2d 176, it was held to be reversible error where the trial Court failed to define various crimes involved in an indictment for murder, and also failed to define elements of each, this case citing with approval Williams vs. United States, 1942, 76 U.S. App. D.C. 299, 131 F.2d 21. To like effect insofar as adequacy of instructions in criminal cases are concerned, see especially, McAffee vs. United States, 1939, 70 U.S. App. D.C. 142, 105 F. 2d 21, in which case the late Judge Stephens was at great pains to spell out the requisites underlying instructions in criminal cases. Hardly, a more scholarly and erudite exposition on instructions, is to be found anywhere in any legal treatise. In this opinion the learned Judge explored the entire field of instructions particularly applicable to murder prosecutions and instructions which should be given in every criminal case. This Court is quite familiar with this McAffee opinion, which had strong dissents, and specific quotation of particular parts of that opinion does not appear to be necessary other than to set out below excerpts as they appear relevant to what now appears (after a re-reading of the trial Judge's charge in the instant case) to be an after-thought on the part of counsel for the appellant.

Rule 52 (b) of the Federal Rules of Criminal Procedure provide for Notice of plain errors by the appellate Court even where such errors were not brought to the attention of the trial Court. We respectfully submit that the charge of the trial Judge in this case is also open to attack, in that, only at one place in the charge do we find any statement

to the effect that the appellants or any of the other defendants in the lower Court should be found not guilty; nor is there any statement in the charge that the defendants should be acquitted unless the jury found beyond a reasonable doubt that all of the elements of some crime existed. At page 150 of the transcript, we find the only language of the Judge in his charge concerning the proposition that the defendants could be found innocent. The trial Judge used this language:

"If after weighing and considering all the evidence in this case you cannot say that you are satisfied of the guilt of the defendants, then you have a reasonable doubt and should find them not guilty."

This quoted excerpt of the Trial Judge's charge is weak, to say the least and we respectfully submit that it fails to meet the test and criteria as to what is the minimal requirement on this point. In McAffee, supra, the Court said:

"And it is true that nowhere in the instructions were the jury in terms told that unless they found beyond a reasonable doubt that all of the elements of some crime existed, they must acquit the defendant. The jurors were told in one place: 'Of course, if you do not find that the defendant struck the fatal blows, that is the end of the case and you needn't spend any more time on it. If you find he did strike the fatal blows, then I instruct you as a matter of law he is guilty of criminal homicide, and the only question for to determine is which degree it was, whether first or second degree, or manslaughter.'"

After setting out the excerpt from the trial Judge's charge in this McAffee case, the appellate Court went on to state in its majority opinion that:

"Notwithstanding this, it is the view of Associate Judges Miller and Vinson and myself that the contention of the defendant in this aspect of the case is meritorious. We think it should be orthodox practice somewhere in the instructions to tell the jury in precise terms that a not guilty verdict is necessary in the event of failure by the government to prove each of the elements of some offense beyond a reasonable doubt. While this was implied in the language last above quoted, it was not, in our view, stated with sufficient explicitness."

Here in the instant case we have what might be construed, by implication, as telling the jury that they might acquit the defendants, but certainly there is a lack of explicitness (using the language of Judge Stephens in McAfee) with no explanation as to the various elements constituting the various offenses set out in the indictment. Therefore we would urge this as further reasons for a reversal of this judgement.

CONCLUSION

Wherefore, it is respectfully submitted and urged upon this Court that the judgments against these appellants should be reversed, as to all counts of the indictment.

Respectfully submitted,

WESLEY S. WILLIAMS

506 Fifth Street, N. W.
Washington, D. C.

Attorney for Appellants

(i)

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APPENDIX

THE SEARCH WARRANT:

Affidavit in support of application for search warrant:-----

"Statement of facts relative to request for U. S. Commissioner's Search Warrant for the premises 4451 Deane Avenue, N.E. (entire premises) Washington, D.C. and arrest warrant for the individual named herein for violation of the lottery law of the District of Columbia. Having received information from reliable source that a numbers operation was taking place on the premises 4451 Deane Avenue, N.E. Pvt. Felix Aiken was assigned to investigate.

Monday, January 16, 1956 at about 12:10 P.M. Pvt. Felix R. Aiken went to the premises of 4451 Deane Avenue, N.E. While on the premises Pvt. F. R. Aiken observed King, Elton Franklin, a known numbers operator sitting at a desk with a large stack of numbers slips in front of him and a bag containing several dollars in change. When King saw Pvt. Aiken he immediately placed the stack of number slips into his right inside coat pocket and attempted to cover a pad that was lying on the desk. This pad had three numbers plays written on it with sums of money opposite the figure.

It is the belief of the undersigned officer that premises 4451 Deane Avenue N.E. located in the District of Columbia, is now being used to conduct a policy lottery and that numbers slips and/or other numbers paraphernalia are now being secreted in this premises, in violation of the lottery laws of the District of Columbia and the aforementioned person is actively engaged in the operation of a policy lottery. I believe that the individual named herein is the owner or operator of the above premises. FRA

/s/ Felix R. Aiken

/t/ Felix R. Aiken

Morals Division, MPDC

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 25 DAY OF JANUARY 1956.

/s/ Cyril S. Lawrence

/t/ Cyril S. Lawrence

UNITED STATES COMMISSIONER FOR THE DISTRICT OF COLUMBIA
COPY 10802"

THE INDICTMENT:

*****On or about February 3, 1956, within the District of Columbia, Elton F. King, Thomas Ballenger, John H. Thomas, David Golden, Lewis H. Woodard, William J. Hill, Clarence E. Lipscomb, Lawrence E. Brown, Ethel Lee Collins and Emma Bess were concerned as owners, agents and clerks, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game.

On or about February 3, 1956, within the District of Columbia, Elton F. King knowingly had in his possession and under his control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, used and to be used and adapted, devised and designed for the purpose of playing, carrying on and conducting a lottery known as the numbers game.

On or about February 3, 1956, within the District of Columbia, John H. Thomas knowingly had in his possession and under his control notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writings, used and to be used and adapted, devised and designed for the purpose of playing, carrying and conducting a lottery known as the numbers game.

On or about February 3, 1956, within the District of Columbia, Elton F. King engaged in the business of accepting wagers, and, by reason of such activity, was required by law, on or before February 3, 1956, to pay to the Director of Internal Revenue for the Internal Revenue Collection District of Maryland the occupational tax of \$50.00 imposed by Title 26, United States Code, Section 4411, on persons engaged in receiving wagers; and at the time and place aforesaid the said Elton F. King did fail to pay the said special tax to the said Director of Internal Revenue in violation of Title 26, United States Code, Section 7262.

On or about February 3, 1956, within the District of Columbia, John H. Thomas engaged in the business of accepting wagers, and, by reason of such activity, was required by law, on or before February 3,

1956, to pay to the Director of Internal Revenue for the Internal Collection District of Maryland the occupational tax of \$50.00 imposed by Title 26, United States Code, Section 4411, on persons engaged in receiving wagers; and at the time and place aforesaid the said John H. Thomas did fail to pay the said special tax to the said Director of Internal Revenue in violation of Title 26, United States Code, Section 7262.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,603

ELTON F. KING, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 13,604

JOHN H. THOMAS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 4 1901

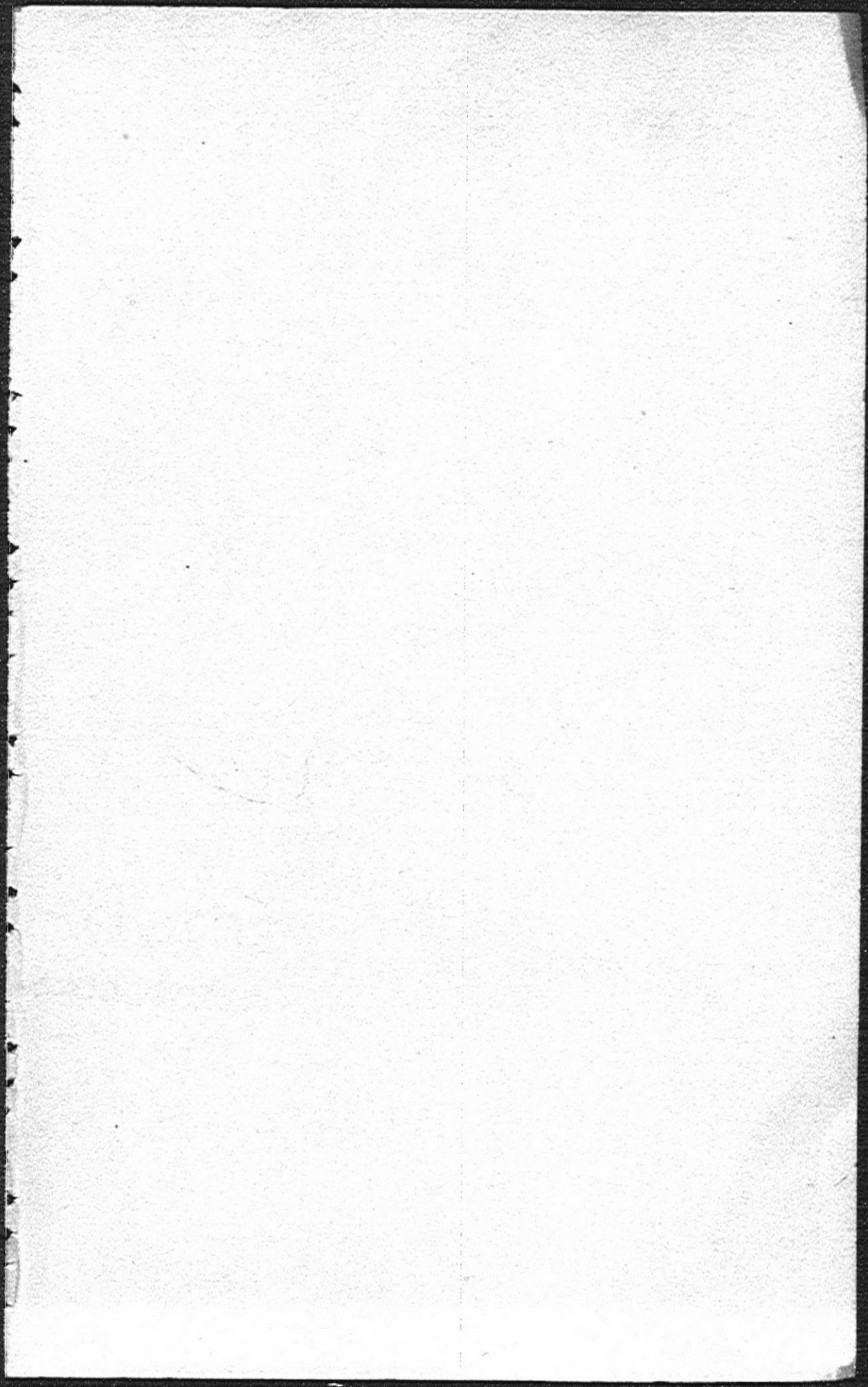
Joseph W. Stewart
CLERK

OLIVER GASCH,

United States Attorney.

LEWIS CARROLL,
HAROLD H. TITUS, JR.,
JOHN D. LANE,

E. TILLMAN STIRLING,
Assistant United States Attorneys.



QUESTIONS PRESENTED

At a pretrial hearing on a motion to suppress evidence, a police officer testified that while in a part of a gasoline station to which the public is invited, he saw appellant King in possession of lottery paraphernalia. He subsequently obtained a search warrant and an arrest warrant, and when the warrants were executed the evidence sought to be suppressed was found in the premises and in the possession of the appellants.

In the opinion of the appellees, the following questions are presented:

1. Was the motion to suppress properly denied.
2. Were the instructions complete and proper.

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UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On April 30, 1956 appellants were indicted in three counts with operating or being concerned with a lottery in violation of D. C. Code § 22-1501, and with possession of numbers slips in violation of D. C. Code § 22-1502, and with accepting wagers without having paid the occupa-

tional tax in violation of 26 U.S.C. 4411. After a full hearing on appellants' motion to suppress the evidence, the court on June 27, 1956 denied the motion. Trial by jury started on October 3, 1956 and on October 5 the jury returned a verdict of guilty on all counts with respect to both appellants, and on November 11, 1956 appellant Thomas was sentenced to serve from 5 to 15 months imprisonment on Count One; one year on Count Four to run concurrently with the sentence imposed on Count One, and to pay a fine of \$1,000.00 on Count Fourteen. Appellant King was sentenced to serve 8 to 24 months imprisonment on Count One; one year on Count Two, concurrent with Count One, and to pay a fine of \$1,000.00 on Count Twelve. This appeal follows.

Private Felix R. Aiken testified at the pretrial hearing on the motion to suppress the evidence that on January 16, 1956 he had occasion to go to the gasoline station at 4451 Deane Avenue, Northeast, Washington, D.C. at about 12:10 p.m. (R. 4). Upon entering the office of the gasoline station in order to go to the public restroom, Officer Aiken stated that he observed appellant King seated at a desk with several regulation numbers slips to his left; a pencil in his right hand, and a bag containing some change and bills. He further observed a three by five inch white pad on which three numbers were written. One of the numbers was "836 for twenty-five cents." (R. 9). Upon seeing the officer, King "grabbed" the regulation numbers slips and placed them in his coat pocket and attempted to cover the pad that was in front of him (R. 10). Officer Aiken further testified that he subsequently obtained a search warrant for the gasoline station and an arrest warrant for King, and on February 3, 1956 the warrants were executed (R. 15). Officer Aiken said he has seen many numbers slips and based on his past experience recognized the slips he saw in King's possession as being numbers slips (R. 18).

Sergeant Michael Molesky, testified at the pretrial hearing that he was present at the gasoline station on February 3, 1956 at 1:28 p.m. when the search warrant was executed. He stated that he arrested appellant Thomas (R. 20) inside

of the office, and recovered a large quantity of numbers slips from him (R. 21). He also stated that numbers slips were found on the floor and some run-down tapes were found in the cash register. Numbers slips were also found in a metal container which was outside the office. (R. 24-25).

Officer Aiken was recalled and testified that when the raid was made on the gasoline station on February 3, 1956 he had an arrest warrant for King as well as the search warrant for the premises. He arrested King. (R. 63.) During the course of the raid *Officer Aiken* said a woman called and asked when King was coming to pick up her work. The officer told her that King was going to be tied up for a while. The woman then said, "It is getting late. Somebody had better." *Officer Aiken* offered to come by and pick up her work so she gave him her address and he and *Private McElvane* drove to the address and picked up the numbers slips from the woman and another woman together with a bag of money. After receiving a package of slips from each the two officers placed them under arrest. (R. 66-67.) The two women, *Ethel Lee Collins* and *Emma Bess*, were convicted on the same charges as were the appellants.

Private Henry McElvane, (R. 42-52, 87-99), *Lieutenant George Causey* (R. 69-72), and *Private Vernon Reynolds* (R. 74-82, 100-115), all testified concerning the execution of the search and arrest warrants. In all, ten defendants were caught and indicted as a result of the raid on the gasoline station on February 3, 1956, and much of the testimony concerns the details of the arrests of the other defendants who are not appealing. Prior to the pretrial hearing both appellants filed affidavits stating that certain papers were taken from them during the raid on February 3, 1956. At the close of the hearing the motions to suppress were denied.

At the trial the officers gave similar testimony to that which they had given at the pretrial hearing. In addition, *Captain Todd O. Thoman*, Metropolitan Police Department, qualified as an expert on the numbers game and the para-

phernalia therein used (R. 235, 237). He then identified Government Exhibit Number 10 (the paraphernalia taken from appellant King) as numbers slips and run-down tapes (R. 243). He further identified Government Exhibit Number 14 (the paraphernalia taken from appellant Thomas) as being numbers slips (R. 244-245).

At the close of all the evidence appellant offered a proposed instruction (Defendants' Instruction Number Two) which the court denied (R. 263). However, appellant then stated that since the court would not give the instruction he would argue it in his closing statements to the jury. The court made no objection to this procedure and, although the closing arguments were not transcribed, appellant presumably covered the point in his argument.

After charging the jury (R. 265-275) the following colloquy ensued (R. 274):

The COURT: Gentlemen, have I covered it?

Mr. WILLIAMS: I think you have.

Mr. TITUS: Yes.

The COURT: Are you satisfied, Mr. Williams?

Mr. WILLIAMS: Yes.

After deliberation the jury returned a verdict of guilty.

STATUTES INVOLVED

District of Columbia Code, § 22-1501 (1950 Ed.) provides:

Lotteries—Promotion—Sale or possession of tickets.

—If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell

or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

District of Columbia Code. § 22-1502 (1950 Ed. Supp. IV) provides:

Possession of lottery or policy tickets.—If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

SUMMARY OF ARGUMENT

In an affidavit in support of an application for a search warrant, a police officer stated that while on the premises of appellant King, a known numbers operator, he saw King in possession of lottery paraphernalia. Although the officer had statutory authority to arrest King at that time, he first obtained a search warrant and arrest warrant. There is no question that when the officer saw the crime

being committed, he had probable cause to obtain the warrants. Much less than actual sight of the crime being committed has been held to constitute probable cause for obtaining a warrant.

After the court charged the jury, appellant stated that he was satisfied. His present allegations that the court should have more fully explained the meaning of "prima facie", and should have told the jury more than just one time that they could find the appellants not guilty are not in accordance with the previous decisions of this Court. The charge as given was complete and correct.

ARGUMENT

I

Probable Cause Was Established by Direct Observation of the Commission of the Crime

Appellants' first argument is that the evidence should be suppressed because the search warrant was not based on probable cause in the particular that it was issued on the affidavit of an officer who swore to but "one isolated observation on the premises" subsequently searched (Br. 5). In support of this contention appellant cites such cases (*e.g.*, Br. 11) as *Mills v. United States*, 90 U.S. App. D.C. 365, 196 F.2d 600 (1952).

The argument runs that in such cases as the *Mills* case the officer made more than one observation. Where a police officer's surveillance affords but circumstantial evidence that a criminal enterprise is being conducted at a particular place, naturally the number of such observations may be relevant to determine whether an affidavit is sufficient to establish probable cause. Further, where application for a search warrant is based on hearsay, an affidavit may be examined for indications of reliability of information imparted to the officer. But where, as here, an officer actually witnesses the commission of the crime, and his affidavit so reflects, such cases have no bearing.

It is not frequent that an officer has an opportunity to see directly a lottery in operation, and must rely ordinarily on

observations affording circumstantial indications of the existence of the criminal enterprise. It is in recognition of this pragmatic principle that it has been held "The existence of probable cause does not require that the officer then possess legal evidence sufficient to convict." *Washington v. United States*, 92 U.S. App. D.C. 31, 32, 202 F.2d 214 (D.C. Cir.), *cert. denied*, 345 U.S. 956 (1952). Here there was legal and sufficient evidence of guilt and therefore, for a stronger reason than those advanced in the cases relied on by appellant, probable cause was established. Observations may be many, or few, and in a particular case may amount only to suspicion. If an officer witnesses the commission of the crime itself probable cause is eminently established and the number of observations is irrelevant.

It is fruitless to compare a case where commission of a crime was directly observed with those dealing with the sufficiency and number of observations indicating circumstantially the existence of a criminal enterprise. Therefore there is no basis for appellants' argument because it calls for the comparison of unlike situations. In perspective what appellants urge as weakness is actually strength, probable cause having been more than amply demonstrated.

II

There Was No Error in the Charge

In the lottery statute there is a statutory presumption whereby possession of numbers slips is constituted "prima facie evidence" of operating a lottery.¹ At the close of the evidence appellants proffered a written requested instruc-

¹ "... The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery." 31 Stat. (1901), as amended, 22 D.C. Code § 1501 (1951).

tion² in which they asked that the jury be told that even if "convinced that the government has made out a prima facie case" they "must go beyond this prima facie showing and find from the evidence that the government has proved its case . . . to convict these defendants . . . you must conclude that they were in fact engaged in the operation of a lottery" (Appellants' Br. 14) .

Appellants now urge the denial of this requested instruction was error (Br. 13). It is observed that the instruction misstates the law concerning statutory presumptions. Appellants' suggested instruction did not ask that the jury be told such presumptions are rebuttable, which, of course, they are. However, by elementary definition a jury *may* deduce the ultimate fact, there the operation of a lottery, where it has found the underlying fact on which the presumption is based. To say it *must* then go forward is to circumscribe the jury's power and to misstate the law. Courts are not required to correct mistaken instructions.³ Further, in the particular area which the request covered, it has been held that a charge based on the language of the statute is sufficient.⁴

It is significant in more than one particular that upon denial of the requested instruction appellants asked and received permission to "argue the point rather than have Your Honor give it as a proposition of law" (R. 262). This was in recognition that the instruction was argumentative in its aspect of singling out particular evidence in order to minimize it.

As detailed in the counterstatement, at the close of the charge appellants affirmatively stated their agreement with it as rendered. This statement, in the light of the previous permission accorded to develop before the jury the substance of their requested instruction and their prior recog-

² The instruction is reproduced in appellants' brief at page 14.

³ *Sweeney v. Erving*, 228 U.S. 233, *affirming* 35 App. D.C. 57 (1919).

⁴ *Maynard v. United States*, 94 U.S. App. D.C. 347, 215 F.2d 336 (1954); *Terminal R. Ass'n. of St. Louis v. Howell*, 165 F.2d 135, 140 (8th Cir. 1948).

dition that it was argumentative, put the instant case squarely within the policy of *Villaroman v. United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950), requiring, in accordance with Rule 30, Federal Rules of Criminal Procedure that defects in a charge be distinctly pointed out before a jury retires.

In view of the permission given to argue the point, which presumably was adequately done in his argument, if error be assumed it manifestly did not affect substantial rights. Fed. R. Crim. P. 52(a). Therefore, the record clearly shows that the charge as given was correct and proper.

Appellants' allegation (Br. 15-16) that it was error for the court to tell the jury only once that they could return a not guilty verdict is not well taken. In *McAffee v. United States*, 70 App. D.C. 142, 150, 105 F.2d 21 (1939) this Court indicated that such an instruction should be given once, but did not indicate that it was necessary to repeat it.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

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